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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1187

MASON and DIXON LINES, INCORPORATED,
PETITIONER,

vs.

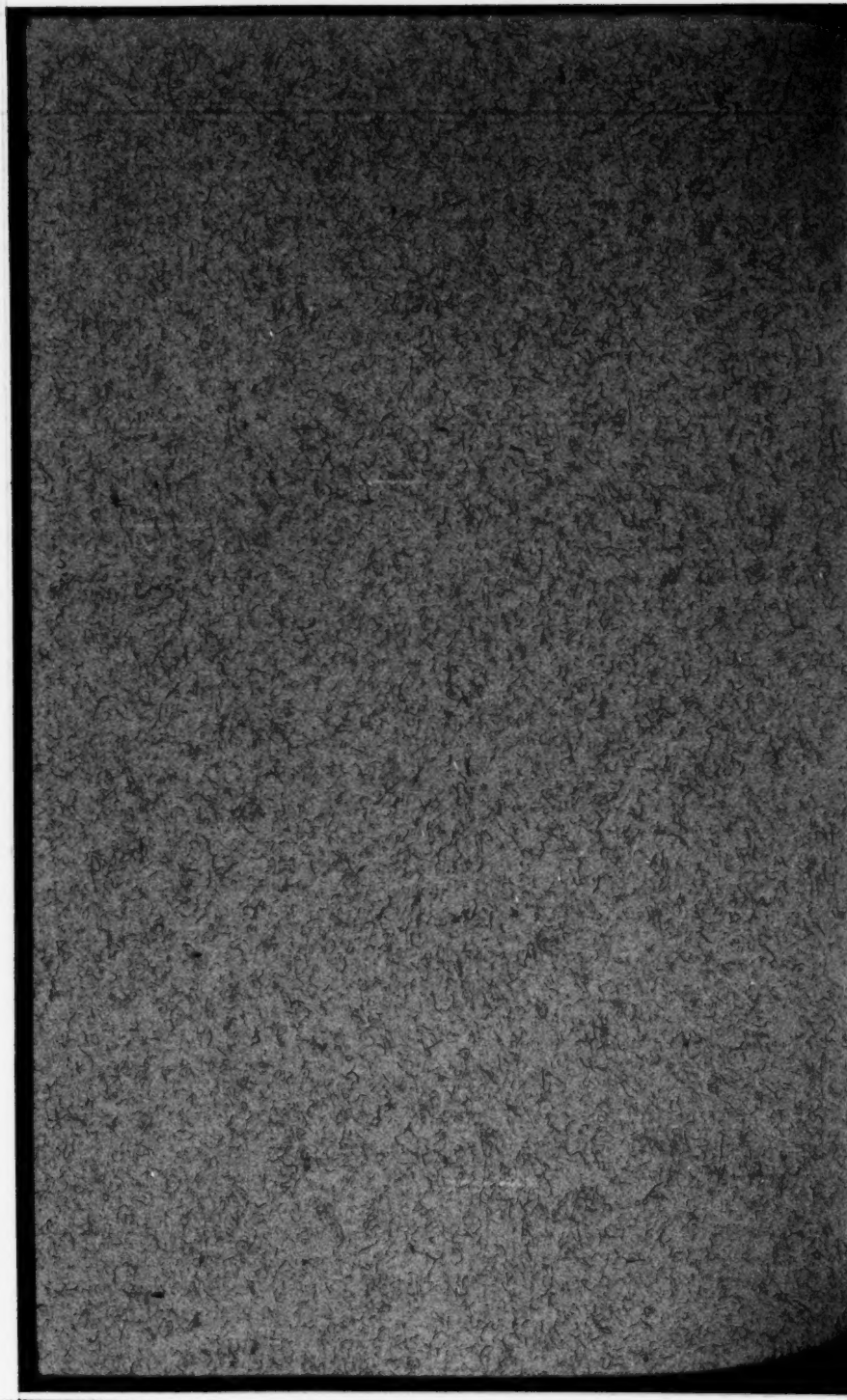
COMMONWEALTH OF VIRGINIA, ex rel.
Relation of STATE CORPORATION
COMMISSION.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ABRAM P. STAPLES,
Attorney General for the Commonwealth of Virginia.

WALTER E. ROGERS,
Assistant Attorney General for the Commonwealth of Virginia.

ANDERSON PUBLISHING COMPANY, LTD.
RICHMOND, VA.



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COMMONWEALTH OF VIRGINIA, at the Relation of STATE CORPORATION COMMISSION.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

This brief is filed on behalf of respondent, Commonwealth of Virginia, at the relation of State Corporation Commission, in opposition to the granting of the writ of *certiorari* prayed for in the petition for the reason

that the case presents no Federal question of substance decided by the court below not heretofore determined by this Court.

STATEMENT OF THE CASE

Petitioner is a Tennessee corporation and a motor carrier operating over the highways of the Commonwealth of Virginia. In proceedings before the State Corporation Commission of Virginia it was determined that for the period from July 1, 1942, through December 31, 1945, the petitioner failed to purchase gasoline or other motor fuel necessary for its operation as a motor carrier within Virginia to the extent of 559,178.57 gallons and that the petitioner failed to pay into the treasury of the State of Virginia as an alternative to such purchase an amount equivalent to the prevailing State tax on the said amount of 559,-178.57 gallons of gasoline or other motor fuel, which equivalent amount was $27,958.93. (R. pp. 36, 37).

Acting under the provisions of Chapter 108, Acts of Assembly of Virginia of 1942, the State Corporation Commission entered judgment against the petitioner whereby the petitioner was ordered to pay to the Commonwealth of Virginia the sum of $27,958.93 plus a penalty of $1,000 for its failure to comply with the provisions of said Act.

On appeal by the petitioner to the Supreme Court of Appeals of Virginia the judgment of the State Corporation Commission was affirmed.

Before the State Corporation Commission and the Supreme Court of Appeals of Virginia the petitioner challenged the validity of Chapter 108 of the Acts of Assembly of Virginia of 1942 (printed as Appendix B to the petition for writ of certiorari) as being in violation of the Commerce Clause of the Constitution of the United States. It was contended that the Act required the purchase of motor fuel in Virginia and was an unlawful attempt to regulate interstate commerce. It was further contended that the statute discriminates against interstate commerce and that it violates the Commerce Clause of the Constitution of the United States in imposing a tax upon the privilege of using an instrumentality of interstate commerce.

The petitioner also contended that the evidence did not establish the amount of motor fuel necessary for use by the petitioner in its Virginia operations and challenged the method used to determine the quantity of motor fuel necessary for such use.

OPINIONS BELOW

The State Corporation Commission held that the statute imposed upon all motor carriers operating for compensation over the highways of Virginia, either in interstate or intrastate commerce, a compensatory charge or tax for the use of such highways measured by the amount of motor fuel consumed in Virginia operations; that such charge could be paid, either by buying in Virginia and paying the regular motor fuel tax thereon the motor fuel necessary for operation in

Virginia, or by paying directly into the State treasury an amount equivalent to the prevailing State tax on the amount of such fuel. It was held that, since the contribution exacted for the maintenance, construction and reconstruction of the highways provided by the State was proportionate to the use made of such highways, no unconstitutional burden was placed upon interstate commerce (See opinion of Downs, Chairman of the Commission, R. pp. 38-50).

The Supreme Court of Appeals of Virginia sustained the conclusions of the State Corporation Commission and held that the finding by the Commission as to the amount of motor fuel necessary for the petitioner's Virginia operations was supported by competent evidence. (See opinion of Chief Justice Holt, R. pp. 51-59).

THE QUESTION PRESENTED

The petitioner states five questions which he desires to present to this Court if *certiorari* is granted. The only substantial question, however, is whether the statute imposes a valid compensatory charge for the use of Virginia highways by the petitioner and others operating as motor carriers for compensation in Virginia.

ARGUMENT

I.

THE STATUTE DOES NOT REQUIRE THE PURCHASE OF MOTOR FUEL IN VIRGINIA, BUT MERELY IMPOSES A COMPENSATORY CHARGE UPON MOTOR CARRIERS USING THE HIGHWAYS OF VIRGINIA.

The petitioner contends that the question before this Court is whether the State of Virginia may constitutionally require the purchase of gasoline in Virginia. This flies squarely into the teeth of the statute and the construction placed upon the same by the State Corporation Commission and the State Supreme Court. The statute provides that every motor carrier operating over the highways of Virginia for compensation, whether in intrastate or interstate commerce or both, shall—

> " * * * purchase, within the State, gasoline or other motor fuel, at least equal to that amount necessary for use in the operation as a motor carrier within the State, or such motor carrier shall, in lieu of making such purchase, pay into the treasury, for credit to the State Highway Fund, an amount equivalent to the prevailing State tax on the amount of gasoline, or other motor fuel, necessary for its operation as a motor carrier within this State over and above the amount of tax paid on gasoline, or other motor fuel actually purchased in the State." (Acts of 1942, Chap. 108, Sec. 1.)

There is no requirement whatsoever that any motor carrier purchase one drop of gasoline in Virginia. The statute provides for two equally applicable, alternative methods, or a combination of both, by which motor carriers may pay the compensatory charge for the use of the highways of Virginia. The second alternative is in no way a penalty for the failure to purchase motor fuel in Virginia, but is simply a different method by which motor carriers may pay the compensatory charge.

The petitioner alleges that the statute demands something which its terms do not require and then argues that the statute as so erroneously construed is unconstitutional. As pointed out by the Chairman of the State Corporation Commission in his opinion (R. p. 42), if the petitioner sees fit to purchase its motor fuel requirements elsewhere, it is free to do so, but, not wishing to purchase its Virginia requirement in the State, it must contribute its fair share toward the maintenance of the highways over which it travels.

Chief Justice Holt of the State Supreme Court said in his opinion (R. p. 57):

> "In the construction of a statute, we look to its four corners. This statute would still apply if every gallon of gasoline bought by the defendant had been purchased in another State. It is for the use of the highways of the State that this tariff is assessed against it.
>
> "We are not concerned with names. It may be called a 'tax', and it may be called a 'charge' for the use of highways which the State has built. It applies to all motor vehicles operated for hire, whether engaged in interstate or intra-

state traffic. Every motor vehicle in Virginia which uses her public highways contributes in one way or another to their construction and maintenance. There is no claim that the charge in itself is excessive, and this is not affected by the fact that the motor carrier using Virginia highways purchases all of its gasoline in Tennessee or Texas. Construing the Act of 1942 as a whole, the point of its purchase is unimportant."

The Act imposes no unreasonable burden upon interstate commerce. If the petitioner, or any motor carrier whether operating in interstate or intrastate commerce, finds that it can purchase motor fuel without the State on better terms than it can do so within the State, it is free to do so. It is simply required to pay its fair share of maintaining the highways it uses in this State. The fact that it may pay a sales tax to the State in which it purchases the motor fuel is no reason it should be relieved of that obligation.

As was held by the courts below, the Act clearly imposes a compensatory charge which is not only measured by the *quantum* of use of the highways, but which is expressly dedicated to the construction and maintenance of such highways. If a motor carrier adopts the method of paying the charge by buying gasoline in Virginia and paying the regular gasoline tax on the motor fuel "necessary for use in the operation as a motor carrier in this State", the proceeds are dedicated to the maintenance and construction of highways by section 6 of Chapter 212 of the Acts of 1932, as

amended by Chapter 206 of the Acts of 1942.* If the motor carrier adopts the method of paying directly into the State treasury an amount equivalent to the prevailing State tax on the amount of gasoline "necessary for its operation as a motor carrier within this State", the proceeds are dedicated to that purpose by sections 1 and 3 of Chapter 108 of the Acts of 1942.

That such a compensatory charge for the use of public highways is valid cannot be seriously questioned. The authorities overwhelmingly support this view. The following from *Interstate Transit* v. *Lindsey*, 283 U. S. 183, 75 L. Ed. 953, 964-967,

> "While a state may not lay a tax on the privilege of engaging in interstate commerce * * * it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the

*"Section 6. Disposition of funds collected.—After providing for the refunds under this act, the director shall promptly pay all taxes and fees collected by him under this act into the State Treasury. The revenue derived from the tax levied as aforesaid is hereby appropriated for the construction of the roads and projects comprising the State primary highway system and for the construction or maintenance of the roads and projects comprising the State secondary highway system and shall be applied to no other purpose, except that there may be paid out of this fund as contribution towards the construction, reconstruction and/or maintenance of streets in cities and towns such sums as may be provided by law, and except further, that such sums out of said funds may be expended for the operation and maintenance of the highway department and the Division of Motor Vehicles as may be provided by law, provided, however, the Governor is hereby authorized to transfer out of the said gasoline tax an amount not exceeding twenty-five thousand ($25,000.00) dollars annually for the purpose of inspection of gasoline and motor grease measuring and/or distributing equipment, and/or for inspection and analysis of gasoline for purity; and there shall be paid out of this fund the amount appropriated to the Corporation Commission for the Division of Aeronautics."

> cost of constructing and maintaining them and of regulating the traffic thereon * * * . As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use * * * , *or by the express allocation of the proceeds of the tax to highway purposes*, as in *Clark* v. *Poor*, 274 U. S. 554, 71 L. Ed. 1199, 47 S. Ct. 702, *supra*, or otherwise. *Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory.* * * * " (Italics supplied).

is directly applicable on principle to the instant case when the nature and disposition of the charge here involved are considered, and the record discloses not even a suggestion that the charge does not bear a "reasonable relation to the privilege of using the highways or (that it) is discriminatory."

The above principle has been adhered to time and again. Among the many cases may be mentioned *Hendrick* v. *Maryland*, 235 U. S. 610, 59 L. Ed. 385; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245, 72 L. Ed. 551; *Clark* v. *Poor*, 274 U. S. 554, 71 L. Ed. 1199; *Ingels* v. *Morf*, 300 U. S. 290, 81 L. Ed. 653; *Dixie Ohio Express Co.* v. *State Revenue Commission*, 306 U. S. 72, 83 L. Ed. 495.

The petitioner does not deny that the charge imposed by the statute is compensatory. Nor is it contended that the imposition of such a charge violates the Commerce Clause of the Constitution of the United States. In view of the authorities sustaining such a charge the petitioner could not make such a contention with hope of success. He, therefore, contends for a construction of the statute not justified by its terms and which was rejected by both the State Corporation Commission and the Supreme Court of Appeals of Virginia. But the Virginia Supreme Court of Appeals has the final say in the interpretation of Virginia statutes and its construction will be accepted here. *Spector Motor Service* v. *McLaughlin*, 323 U. S. 101, 104, 89 L. Ed. 101, 103. This Court, therefore, will not construe the statute differently in order to render it unconstitutional as advocated by the petitioner.

II.

The Petitioner's Attack Upon the "Formula" Used by the State Corporation Commission to Determine the Amount of Motor Fuel Necessary for Petitioner's Virginia Operations Presents No Federal Question.

The statute fixes the base or measure of the compensatory charge as the gasoline "necessary for use" in Virginia operations. The petitioner was charged with not paying into the treasury of Virginia "an amount equivalent to the prevailing State tax on the amount of gasoline or other motor fuel necessary for its operation as a motor carrier within this State (Vir-

ginia) over and above the amount of tax paid on gasoline or other motor fuel actually purchased in the State." (R. p. 10).

The uncontradicted testimony of the witness Masten, First Assistant Assessor of the Commission, is that Appellant for the period July 1, 1942-December 31, 1945, failed by 559,178.57 gallons to purchase in Virginia gasoline necessary for use in its Virginia operations, and that it likewise failed to pay into the State treasury an amount equivalent to the prevailing State gasoline tax on this 559,178.57 gallons. (R. pp. 20, 21). Thus the judgment of the Commission for failure to pay into the State treasury an amount equivalent to the prevailing tax (five cents per gallon) on this 559,178.57 gallons in lieu of the purchase thereof in Virginia was for $27,958.93. (R. pp. 20, 21, 37).

And on cross-examination by Mr. Shelton Mr. Masten further testified as follows (R. 27):

> "Q. Are you able to give the Commission, Mr. Masten, the amount of gasoline or motor fuel which was necessary for their operation in the State of Virginia over the period in question?
>
> "A. Yes, sir.
>
> "Q. Sir?
>
> "A. Yes, sir.
>
> "Q. What was that amount?
>
> "A. 2,940,563.67 gallons.
>
> "Q. May I ask how you arrived at that figure?
>
> "A. By taking the total number of miles traveled as compared with the total miles traveled in Virginia to determine the percentage of operation in Virginia and applying that percentage to

the total number of gallons of motor fuel purchased by the Company."

There was not a shred of evidence that the "formula" was not accurate. The petitioner's auditor testified in the case, but not as to the amount of gasoline necessary for petitioner's Virginia operations. If the formula had not been reasonably accurate, petitioner could have presented evidence to substantiate its contention.

The question before the State Supreme Court was whether the evidence supported the finding as to the amount of gasoline necessary for the petitioner's Virginia operations. That court held that the finding was sustained by satisfactory evidence. (R. p. 59). The record presents no basis for a review of this question here.

III.

The Statute Applies to Intrastate Carriers as Well as Interstate Carriers and In No Way Discriminates Against the Latter.

The statute expressly applies to intrastate carriers as well as interstate carriers. See Appendix B to the petition. The petitioner's charge that it is applied only to interstate carriers is utterly without foundation and we do not understand the basis for the same. If an intrastate carrier purchases without the State gasoline necessary for its operations within the State, it must

pay an amount equivalent to the State tax on such gasoline just as is the case with an interstate carrier.

As stated in the opinion of the State Corporation Commission, the statute is in terms applicable to intrastate motor carriers as well as to interstate carriers and nowhere in the record is there evidence tending to show either affirmatively or by inference that any discrimination is practiced to the detriment of interstate operators.

CONCLUSION

For the reasons stated it is submitted that the petitioner does not present a case wherein the court below decided a Federal question of substance contrary to the applicable decisions of this court, but on the contrary the only Federal question presented has been decided by the State court in line with the decisions of this court and that, therefore, the petition for a writ of *certiorari* in this case should be denied.

ABRAM P. STAPLES,
Attorney General for the Commonwealth of Virginia.

WALTER E. ROGERS,
Assistant Attorney General for the Commonwealth of Virginia.

Supreme Court-State Library Building,
Richmond 19, Virginia.